

RONALD LAWRENCE MORTENSEN,)
)
 Petitioner,) 2:11-CV-00266-KJD-CWH
)
 vs.)
)
 DWIGHT D. NEVEN, *et al.*,) **ORDER**
)
 Respondents.)
)
 /

I. Background and Procedural History

¹ This summary of facts is taken from the First Amended Petition (ECF No. 17). It is not intended as a finding by the Court, but merely offered as background information.

1 at the location. According to witnesses, a handgun appeared in the passenger's window and six shots
 2 were fired. Daniel Mendoza, one of the group gathered in the area, was killed by the gunfire.
 3 Thereafter, petitioner and Brady proceeded to another drinking establishment frequented by off-duty
 4 police officers. Later, Brady drove petitioner home.

5 The next morning, Brady discovered petitioner's gun in the pickup. He removed the bullets from
 6 the magazine and chamber, placed the gun in a bathroom cabinet and went fishing. The next day, Brady,
 7 accompanied by his police officer father, drove to the police station and Brady gave a statement which
 8 identified petitioner as the shooter.

9 Petitioner was charged on January 17, 1997, by way of Indictment in the Eighth Judicial District
 10 Court for Clark County in case number C140608, with murder with the use of a deadly weapon (open
 11 murder). Ex. 1-4.² The indictment was later amended to include an alternative theory of murder in the
 12 second degree. Ex. 3-64. Following a jury trial, petitioner was found guilty of first degree murder with
 13 the use of a deadly weapon. Ex. 4-84. Petitioner was sentenced by the jury to two consecutive terms
 14 of life without the possibility of parole. Ex. 4-90. The judgment of conviction was entered on July 28,
 15 1997. Ex. 5-108. Petitioner's first motion for a new trial based on newly discovered evidence was
 16 denied on July 28, 1997. Ex. 5-111.

17 Petitioner appealed his conviction and the denial of his motion for new trial on August 4, 1997.
 18 Ex. 5-112. Petitioner raised four grounds for relief in this Nevada Supreme Court case assigned number
 19 30855. The claims raised were:

- 20 1. By ruling that Mortensen could not cross-examine Brady concerning
 21 his numerous incidents of excessive force, the trial court denied
 22 Mortensen a meaningful opportunity to establish Brady's guilt and, in

23 ² The exhibits cited in this order in the form "Ex. ____ - ____" are those filed by petitioner in support of his
 24 First Amended Petition, and are located in the record at ECF Nos. 18-44. The first number identifies the volume
 25 number and the second identified the tab number as listed on petitioner's Master Index of Documents Received
 26 From the State District Court and Nevada Supreme Court found at ECF No. 18. The reader is directed to the
 Master Index of Documents for actual page numbers. Respondents have submitted exhibits in support of the
 motion to dismiss which are identified as "Res. Ex. ____" and are found in the Court's record at ECF No. 56.

1 doing so, denied him his Sixth Amendment right to confrontation and
2 his Fourteenth Amendment right to due process.

3 2. The opinion testimony of Torrey Johnson to the effect that the
4 vehicle from which shots were fired was, in all probability, moving was
without foundation, constitutionally prejudicial, and otherwise
inadmissible.

5 3. By having refused multiple defense efforts to obtain and examine
6 Brady's truck and clothing and by having specifically disregarded a
Justice Court directive to preserve these items, the State did deny
7 Mortensen his due process rights under the Fourteenth Amendment and
an opportunity to establish his innocence.

8 4. The court erred in failing to order a new trial on the basis of newly
9 discovered evidence. After the trial, Carye Morris, a young girl who
alleges that Christopher Brady forced her to commit a sex act upon him
10 when he arrested her, stated that Brady told her he was "evil."

11 Res. Ex. 4, pp. i-ii (ECF No. 56-1, pp. 31-32).

12 Petitioner also filed a second motion for new trial, (ex. 18-148), which the state opposed (ex. 18-
13 150). Following an evidentiary hearing (exs. 18-165, 169), the second motion for new trial based on
14 additional newly discovered evidence was denied (ex. 18-170) and petitioner filed an appeal of this
15 decision in the Nevada Supreme Court on November 3, 1998 (ex. 18-173). The case was assigned
16 number 33293. Petitioner raised two grounds for relief in this appeal.

17 1. That Christopher Brady, the man whom Mortensen has always
18 alleged shot Daniel Mendoza, did, prior to the shooting, describe
himself as "evil" to other officers, the same word Mortensen testified
19 Brady used to describe himself immediately after Brady shot Daniel
Mendoza; and that Chris Brady told Marc Barry, another police officer,
20 on as many as six occasions before the Mendoza shooting, that Brady
wanted to do a "drive-by" shooting.

21 2. That an expert witness prepared relevant notes of his impressions,
22 which notes were provided to the State but were withheld from
Mortensen; that the impressions reflected on the withheld notes were
23 exculpatory; and that the expert witness, with complete disregard for
the scientific method, allowed the conclusions which he intended to
offer to dictate what the relevant facts were?

1 Ex. 19-183, p. 2863. The appeals in case number 30855 and number 33293 where ultimately decided
 2 in a consolidated opinion issued by the Nevada Supreme Court on September 27, 1999, as amended on
 3 October 14, 1999.³ Ex. 20-206, *see also* ex. 10-207. A petition for rehearing was denied on December
 4 27, 1999. Ex. 20-215.

5 Meanwhile, a third motion for new trial was filed on May 6, 1999, alleging additional newly
 6 discovered evidence. Ex. 19-193. This motion was denied following a hearing (ex. 20-201) in Findings
 7 of Fact, Conclusions of Law and Order filed on December 8, 1999 (ex. 20-210). Petitioner appealed this
 8 order to the Nevada Supreme Court. Case number 35316 was assigned to this appeal. Exs. 20-212 and
 9 20-211. This single issue raised in this appeal questioned

10 [w]hether newly discovered evidence that Ramon Ramirez, the
 11 principal eyewitness to testify against Mortensen at trial, was actively
 12 involved in a methamphetamine distribution ring at the time of the
 shooting and at the time of the trial, and may have been armed at the
 time of the shooting, was so significant as to warrant a new trial.

13 Ex. 20-224, p. 1. An Order of Affirmance was entered denying the appeal on October 5, 2001. Ex. 22-
 14 253. Remittitur issued on November 2, 2001. Ex. 22-256.

15 On December 13, 2000, while this third motion for new trial was still pending, petitioner filed
 16 a state post-conviction petition. Ex. 22-240. After further investigation, a supplemental petition was
 17 filed on February 11, 2004. Ex. 23-276. An evidentiary hearing was commenced on July 19, 2007. Exs.
 18 25-345-348, 357. The petition was denied in an order entered April 23, 2008. Ex. 26-368. Petitioner
 19 appealed (ex. 26-370, 384), raising the following grounds for relief:

20 1. The district [court] abused its discretion in limiting the evidentiary
 21 hearing on petitioner's claims of ineffective assistance of counsel
 22 thereby depriving him of due process under the Fourteenth Amendment
 and of the ability to conclusively establish a violation of the Sixth
 Amendment right to effective assistance of counsel.

23 2. Petitioner's conviction and sentence are invalid under the state and
 24 federal guarantee of effective assistance of counsel, due process of law,

25 ³ The record and documents provided by the parties do not indicate when the appeals were
 26 consolidated. Although petitioner had sought such (ex. 19-187); his request was denied (ex. 19-188).

1 equal protection of the laws, cross examination and confrontation and a
2 reliable sentence due to the failure of trial counsel to provide reasonably
3 effective assistance of counsel. United States Constitution Amendments
4 5, 6, 8, and 14; Nevada Constitution Article I, sections 3, 6 and 8;
5 Article IV, section 21.

6 3. Petitioner's conviction and sentence are invalid under the state and
7 federal constitutional guarantee of due process, equal protection of the
8 laws, effective assistance of counsel and reliable sentence because
9 petitioner was not afforded effective assistance of counsel on direct
10 appeal. United States Constitution Amendments 5, 6, 8, and 14; Nevada
11 Constitution Article I, sections 3,6 and 8; Article IV, section 21.

12 4. The jury instruction given in this case defining premeditation and
13 deliberation necessary for first degree murder as "instantaneous as
14 successive thoughts of the mind" violated the constitutional guarantees
15 of due process and equal protection, was vague and relieved the State of
16 it's burden of proof on every element of the crime and mandates reversal
17 of the conviction.

18 5. Failure to provide discovery of impeachment and exculpatory evidence
19 by various law enforcement agencies violated petitioner's due process
20 rights under the Fifth and Fourteenth Amendments to the United States
21 Constitution and right to a fundamentally fair trial.

22 6. Cumulative errors throughout the course of the proceedings have acted
23 to deny petitioner of due process of law and a fundamentally fair trial
24 under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the
25 United States Constitution and the Constitution of the State of Nevada.

26 Res. Ex. 1.

The Nevada Supreme Court entered an Order of Affirmance in case number 52648 on July 15, 2010 (ex. 26-395). Petitioner's motion for rehearing and motion for *en banc* reconsideration were denied (exs. 26-397 and 26-399). Remittitur issued in this case on December 21, 2010 (ex. 26-401). Petitioner commenced these federal proceedings on February 17, 2011, and respondents have moved to dismiss.

II. The Federal Petition

In the first amended petition presented to this Court, petitioner raises a total of thirteen enumerated claims, including:

Ground One: Ineffective Assistance of Trial Counsel in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

I. Pretrial Deficiencies⁴

- A. Counsel failed to engage expert witnesses, including (1) an eyewitness testimony expert, (2) an expert in police procedures, (3) an expert in lighting and reconstruction of lighting conditions, (4) a ballistics and trajectory expert, (5) a gang expert, and (6) a forensic pathologist.
- B. Counsel failed to obtain video tapes from locations visited by petitioner and Brady and interview witnesses to establish Brady wore glasses on the evening of the shooting.
- C. Counsel failed to challenge pretrial identification of petitioner as suggestive.
- D. Counsel failed to subpoena FBI documents and discovery.
- E. Counsel failed to conduct a thorough background investigation of eye witnesses.
- F. Counsel failed to file necessary pretrial motions: e.g., for discovery, for change of venue, to sequester jury and to dismiss for loss or destruction of exculpatory evidence.
- G. Counsel failed to subpoena LVMPD records regarding criminal activity at the shooting location.
- H. Counsel was negligent in recommending hiring an investigation firm that had a conflict of interest due to prior work with the LVMPD, leading to a loss of the investigator at a critical stage of case.
- I. Counsel failed to investigate Brady's involvement with the [LVMPD] "bike team" and his familiarity with the location of the shooting and his "poaching" or "fishing" trips into the area.
- J. Counsel failed to investigate Brady's background for purposes of impeaching his testimony.
- K. Counsel failed to investigate and establish at trial the LVMPD's maintenance of a coercive presence at the location

⁴ These subclaims are set forth in summary form and do not reflect the full content of the claims as argued in the petition.

1 of the shooting in order to pressure residents to testify against
2 petitioner.

3 L. Counsel failed to prepare character witnesses for trial.

4 M. Counsel failed to delay the trial to allow adequate time to
prepare and investigate.

5 N. Counsel failed to prepare petitioner's wife to testify at trial.

6 O. Counsel did not conduct simulations of the shooting in
7 sufficient time to allow a proper defense presentation.

8 P. Counsel failed to investigate petitioner's alleged prior bad acts
9 at Dillards, in order to "repel the misrepresentations made by
the prosecutor."

10 II. Trial Deficiencies

11 Petitioner alleges that counsel was ineffective during trial.

12 A. Counsel failed to cross-examine Brady to establish he lied
about events on the evening of the shooting.

13 B. Counsel failed to cross-examine eyewitnesses to establish their
14 inability to make a valid identification of petitioner and to
establish their bias against police for purposes of
15 impeachment.

16 C. Counsel allowed the jury to view the crime scene after its
conditions had been drastically improved or changed.

17 D. Counsel failed to present evidence or testimony to establish
18 Brady's familiarity with the area.

19 E. Counsel failed to argue that the circumstances of the shooting
20 failed to meet the elements of first degree murder and did not
offer a proper jury instruction defining those elements.

21 F. Counsel failed to impeach Brady's testimony regarding a
22 shoulder holster that he testified he wore on the night of the
shooting, despite being advised of this inaccuracy by
petitioner.

23 G. Counsel failed to present testimony that the witnesses were
24 fearful to talk to defense investigators.

25 H. Counsel failed to establish that the glasses worn by the shooter,
26 as described by the eyewitnesses, were not similar to the
glasses worn by petitioner.

- 1 I. Counsel failed to object to prosecutorial misconduct during
2 closing arguments.
- 3 J. Counsel failed to object to the use of a demonstration weapon
4 embellished with swastikas on the grips.
- 5 K. Counsel failed to establish that petitioner did not always wear
6 his glasses and they did not match the eyewitness description
7 given at trial.
- 8 L. Counsel failed to offer jury instructions regarding mere
9 presence, regarding eyewitness identifications, regarding the
10 credibility of drug users or addicts, regarding intoxication to
11 negate elements of a crime or defining premeditation and
12 deliberation.
- 13 M. Counsel failed to call character witnesses despite their
14 availability.
- 15 N. Counsel failed to offer evidence that releasing Brady's vehicle
16 within 48 hours violated LVMDP policy.
- 17 O. Counsel failed to move to disqualify improperly influenced
18 jurors.
- 19 P. Counsel failed to offer testimony of comments that one of the
20 line-up participants looked like Brady made during the
21 physical line-up identification of petitioner.
- 22 Q. Counsel failed to cross examine Daniel Ford about changes in
23 the truck window tinting and the obstruction the tinting would
24 have caused to an observer, which would have prevented
25 petitioner from seeing anyone standing in the crime scene area,
26 keeping him from directing Brady down the alley.
- R. Counsel failed to object to improper and prejudicial closing
argument by the state and failed to preserve for appeal the
prosecutor's misstatement of law regarding the death penalty
and his urging the jury to sentence on extraneous factors.
- S. Counsel failed to object to improper comments by the
prosecutor during his opening statement when he expressed his
personal opinion, vouched for witnesses, misstated evidence
to come and called petitioner a rogue cop with a gun.
- T. Counsel failed to object to prosecutorial misconduct in
instances of improper closing argument where the state argued
victim impact, expressed personal opinion, referred to facts not
in evidence, referred to petitioner as having an obsession with
firearms and the crime as a thrill killing, disparaged defense

witnesses and commented on petitioner's right to remain silent.

U. Four witnesses for the state were not cross-examined on their ability to see into the truck because of the headlights.

V. Counsel failed to cross-examine the state's autopsy pathologist about stippling, tattooing or gunshot residue on the victim's clothing and body, or the size of the bullet wound to establish that the fatal shot was not fired from petitioner's gun.

W. Counsel failed to establish that Brady was petitioner's supervisor and the chain of command policies would have required petitioner to report the incident to Brady.

X. Counsel did not present testimony showing Brady was familiar with the "18th St. gang."

Y. Counsel failed to ask any questions on redirect examination of petitioner to rebut issues raised on cross-examination or call additional witnesses to corroborate his testimony.

Z. Counsel failed to move for a mistrial after the prosecutor mentioned petitioner's employment at Dillard's department store.

AA. Counsel waived petitioner's presence at the in-chambers discussion of the jury view of the scene and failed to make a record of the conditions of the viewing and waived petitioner's presence at an in-chambers argument about bad act evidence against Brady.

BB. Counsel failed to object to improper cross-examination commenting on petitioner's right to remain silent.

CC. Counsel failed to present testimony that Brady had altered his appearance for trial to look darker by using tanning or tanning products.

Ground Two: Ineffective assistance of appellate counsel in violation of petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

A. Counsel failed to raise in the direct appeal the claim that the instructions on premeditation and deliberation as well as express and implied malice were erroneous;

B. "[O]ther errors," including:

1 1. Appellate counsel did not claim that trial counsel failed to
2 contact and interview Ruben Ramirez's attorney to learn whether he
3 was to be a witness for the state before he filed a motion for new trial;

4 2. Appellate counsel did not challenge Justice Becker's
5 presence on the Nevada Supreme Court panel reviewing petitioner's
6 appeal based on the fact that, while serving as a district court judge,
7 she issued a search warrant for petitioner's house;

8 3. Appellate counsel did not claim that evidence of Brady's
9 prior bad acts was admissible on more theories than just identity;

10 4. Appellate counsel failed to include in the appendix a copy
11 of a letter to the state putting the state on notice of the defense theory,
12 thereby allowing the court to decide that the state did not act in bad
13 faith in not preserving evidence;

14 5. Appellate counsel did not claim that trial counsel failed to
15 obtain an expert witness to contradict the surprise testimony of Torrey
16 Johnson in order to establish the prejudicial impact of Johnson's
17 testimony about whether the fatal shot came from petitioner's gun
18 before his filed a motion for new trial;

19 6. Appellate counsel failed to claim that prosecutorial
20 misconduct occurred in the opening statements, closing arguments,
21 and the penalty hearing;

22 7. Appellate counsel did not claim that the trial court
23 improperly limited defense exploration of the relationships within the
24 18th Street gang to show that gang loyalty would lead witnesses in the
25 gang to lie at trial in order to show that petitioner was being railroaded
26 by the gang;

 8. Appellate counsel failed to claim that the motion for mistrial
 based on the cross examination by the state of Jose Cribreiro regarding
 petitioners' fascination with and ownership of guns was improperly
 denied;

 9. Appellate counsel failed to claim that improper cross
 examination commented on petitioner's right to remain silent;

 10. Appellate counsel failed to raise a claim of cumulative
 error.

Ground Three: Petitioner was denied discovery of impeachment and exculpatory evidence by
 various law enforcement agencies in violation of the Fifth and Fourteenth Amendments. The items not
 disclosed or discovered included:

- 1 A. Ruben Ramirez's criminal activity for impeachment purposes;
- 2 B. A photograph of Brady's appearance at the time of his interview;
- 3 C. Evidence of previous "fishing trips" by Brady;
- 4 D. Torrey Johnson's handwritten notes;

5 **Ground Four:** The state failed to preserve evidence and investigate the case violating
6 petitioner's rights under the Fifth and Fourteenth Amendments, including:

- 7 A. Testing of Mendoza's hands and clothing for gunpowder residue to show the fatal shot
8 did not come from petitioner's gun;
- 9 B. The police crime scene investigator processed only the passenger side of Brady's truck;
- 10 C. The district attorney gave Brady permission to alter his truck after processing and before
11 trial;
- 12 D. Detectives did not photograph Brady at his interview;
- 13 E. The state allowed Brady's truck to be altered and then objected at trial to testimony
14 about the alterations;
- 15 F. Brady had engaged in previous marauding trips where the prosecutor represented he was
16 unaware of conduct by Brady even closely associated with shooting someone;
- 17 G. Detective Becker engaged in a cover up to exonerate Brady by changing his testimony
18 about Brady's handling of the gun;
- 19 H. The detectives did not interview Lorraine Mohr about her observations.

20 **Ground Five:** Petitioner's right guaranteed by the Fifth and Fourteenth Amendments were
21 violated through prosecutorial misconduct.

- 22 A. The state utilized a demonstration gun during the expert's testimony of trajectories that
23 had swastikas on it;
- 24 B. The prosecutor impugned defense questioning and strategies;
- 25 C. The prosecutor asked sarcastic and demeaning questions of Brady during redirect
26 questioning;
- 27 D. The prosecutor referred to petitioner's former employment at Dillard's department store;
- 28 E. The prosecutor disparaged defense counsel.

1 **Ground Six:** Pretrial identification procedures were impermissibly suggestive in violation of
2 the Fifth, Sixth and Fourteenth Amendments.

3 **Ground Seven:** Jury instructions on premeditation and deliberation and malice were faulty,
4 trial counsel did not object to them, and appellate counsel did not raise the issue in the direct appeal in
5 violation of the Fifth, Sixth and Fourteenth Amendments.

6 **Ground Eight:** As alleged above, the prosecutor committed misconduct, trial counsel did not
7 object to these instances, and appellate counsel did not raise the issue in the direct appeal, violating
8 petitioner's rights under the Fifth, Sixth and Fourteenth Amendments.

9 **Ground Nine:** The police department and the prosecutors treated petitioner disparately from
10 identically or similarly situated persons made up of police officers who are charged with or implicated
11 in criminal activity in violation of petitioner's right to equal protection under the Fourteenth
12 Amendment.

13 **Ground Ten:** The jury instruction on premeditation and deliberation did not draw a rational
14 distinction between first and second degree murder in its "instantaneous as successive thoughts of the
15 mind" language in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

16 **Ground Eleven:** In violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments,
17 cumulative error occurred during the course of the entire proceedings against petitioner as alleged
18 herein, along with evidence not presented to the jury prejudiced petitioner.

19 **Ground Twelve:** Trial counsel did not move for a change of venue due to prejudicial pretrial
20 publicity violating petitioner's rights under the Fifth, Sixth and Fourteenth Amendments.

21 **Ground Thirteen:** In violation of the Sixth and Fourteenth Amendments, the trial court abused
22 its discretion by limiting the scope of the evidentiary hearing in the post-conviction proceedings.
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1 **III. Discussion**

2 Respondents move to dismiss the federal habeas petition, asserting that many of the claims
3 raised in the petition remain unexhausted. ECF No. 50. Petitioner has opposed the motion (ECF No.
4 55) and respondents did not file a reply.

5 A. Legal Standard

6 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies
7 on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement,
8 the claim must have been fairly presented to the state courts completely through to the highest court
9 available, in this case the Supreme Court of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156
10 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the
11 petitioner must refer to the specific federal constitutional guarantee and must also state the facts that
12 entitle the petitioner to relief on the federal constitutional claim. *Shumway v. Payne*, 223 F.3d 983, 987
13 (9th Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with both
14 the operative facts and the federal legal theory upon which the claim is based. *E.g., Castillo v.*
15 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the state courts,
16 as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged
17 violations of federal constitutional guarantees. *See, Coleman v. Thompson*, 501 U.S. 722, 731, 111
18 S.Ct. 2546, 2554-55 (1991).

19 B. Argument

20 Respondents contend that although many of the claims outlined above were presented in the
21 petition for post-conviction habeas corpus brought in the state district court, “the majority of the claims
22 remain unexhausted.” Motion to Dismiss, p. 2. Specifically, respondents assert the following ground
23 remain unexhausted:

24 1:1(A) and all of its subclaims (1) through (6), 1:1(B), 1:1(C), 1:1(D),
25 1:1(F), 1:1(G), 1:1(H), 1:1(K), 1:1(L), 1:1(M) (beyond the allegation
26 that Barry knew of Brady’s statements to do a drive-by shooting),
 1:1(N), 1:1(O), 1:1(P), 1:2(A), 1:2(B), 1:2(C), 1:2(D), 1:2(E), 1:2(F),

1 1:2(G), 1:2(H), 1:2(I), 1:2(J), 1:2(K), 1:2(L) (beyond the allegation
 2 that counsel failed to offer better instructions on premeditation,
 3 deliberation and mere presence), 1:2(M), 1:2(N), 1:2(O), 1:2(P),
 4 1:2(Q), 1:2(R), 1:2(S), 1:2(T), 1:2(U), 1:2(V), 1:2(W), 1:2(X), 1:2(Y),
 5 1:2(Z), 1:2(AA), 1:2(BB), 1:2(CC), 2(A) (beyond the allegation that
 6 appellate counsel did not raise the claim of inappropriate instructions
 7 on premeditation and deliberation), 2(B)(1)-(5), 2(B)(6) (beyond those
 8 allegations raised in post-conviction appeal claim 3(b)), 2(B)(7),
 9 2(B)(9), 2(B)(10), 3(B), 3(D), 4(A)-4(H), 5(A)-5(E), 6, 7 (beyond the
 10 allegation that the premeditation and deliberation instruction's
 11 "instantaneous as successive thoughts of the mind" language was
 12 vague), 8 (beyond the allegation that appellate counsel failed to raise
 13 the claim of misconduct in the direct appeal briefing), 9, 10, 11
 14 (beyond the narrower claim of cumulative error set forth in the
 15 postconviction appeal based on fewer cumulative claims), and 12

16 Motion to Dismiss, p. 15.

17 Petitioner counters that the claims are exhausted because they were presented to the Nevada
 18 Supreme Court as part of the appendix to the Appellant's Opening Brief in his post-conviction appeal
 19 which was repeatedly cited to in the arguments presented. Opposition to Motion to Dismiss, pp. 1-2,
 20 n 1. Petitioner argues that the Nevada Supreme Court must have considered all of his claims when it
 21 determined that a broader evidentiary hearing to further develop facts to support claims raised in the
 22 state post-conviction petition was unnecessary because they were "belied by the record." *See* Order of
 23 Affirmance, July 15, 2010, p. 4 (Exhibits, p. 80).⁵

24 Petitioner also argues that even if some of the claims are supported with additional facts or legal
 25 theories, so long as the basic claims were presented, the expansion of the argument does not render his
 26 claims unexhausted. He further suggests that because he was denied the opportunity to develop the
 facts in state court, it is only natural that his claims "might change as [they] progress through the justice
 system. Opposition, p. 4.

⁵ Which exhibits are referenced in this citation is unclear. However, the index of exhibits provided by
 petitioner reveals this order is found at Ex. 26-394. Such incomplete or confusing citation to the records before
 this Court is not helpful.

1 C. Analysis⁶

2 1. *Incorporation by Reference*

3 Petitioner relies on the holdings of *Scott v. Schriro*, 567 F.3d 573 (9th Cir. 2009) and
 4 *Insyxiengmay v. Morgan*, 403 F.3d 657 (9th Cir. 2005) to support his contention that presentment of
 5 his claims in the appendix to his appellant brief is sufficient to properly present the claims to the
 6 Nevada Supreme Court for purposes of exhaustion because he gave that court an opportunity to remedy
 7 the errors, “whether or not that court took advantage of the opportunity,” citing *Scott*, 567 F.3d at 583.

8 In both *Scott* and *Insyxiengmay*, appellant was allowed to incorporate by reference issues
 9 presented in an appendix but not argued in the appellate brief. *Scott v. Shiro*, 567 F.3d 573, 582 n. 8
 10 (9th Cir. 2009); *Insyxiengmay v. Morgan*, 403 F.3d 657, 668-69 (9th Cir. 2005). Nevada does not allow
 11 such a practice. “Parties shall not incorporate by reference briefs or memoranda of law submitted to the
 12 district court or refer the Supreme Court to such briefs or memoranda for the arguments on the merits
 13 of the appeal.” Nev. R.App. P. 28(e)(2). Because incorporation by reference is a procedurally incorrect
 14 manner to present issues to the Nevada Supreme Court, it does not exhaust petitioner claims. *See*
 15 *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056 (1989).⁷

16 Moreover, petitioner’s case can be distinguished from these cited cases because Nevada, unlike
 17 Arizona in *Scott* and Washington in *Insyxiengmay*, does not require leave of court for a discretionary
 18 review, but rather allows an appeal as of right on denial of a state post-conviction petition. *See* Nevada
 19 Rules of Appellate Procedure, Rule 22 (“An application for an original writ of habeas corpus should
 20

21 ⁶ It is of significance to the Court that respondents have not filed a reply brief and, therefore, make no
 22 effort to rebut petitioner’s arguments. A failure to file opposing points and authorities is considered under this
 23 Court’s local rules to be a concession as to the arguments presented. LR 7-2(d). While the rule does not
 specifically mention a reply or rebuttal, the principle logically holds true for those circumstances as well.

24 ⁷ One month before the court of appeals issued its opinion in *Insyxiengmay*, it ruled that a petitioner may
 25 not rely on his lower-court briefs and pleadings to present a federal claim to the state’s highest court. *Castillo*
 26 *v. McFadden*, 399 F.3d 993, 999-1000 (9th Cir.2005). *Castillo* relies upon *Baldwin v. Reese*, 541 U.S. 27, 124
 S.Ct. 1347 (2004), which held that a petitioner cannot rely upon a state appellate court reading the decision of
 the lower court to present federal claims.

1 be made to the appropriate district court. If an application is made to the district court and denied, the
 2 proper remedy is by appeal to the Supreme Court from the district court's order denying the writ."').
 3 Thus, petitioner's arguments in this regard are not persuasive. The claims were not exhausted by their
 4 inclusion in the appendix to the opening appellate briefs.

5 2. Exhaustion Despite Variations in Fact or Theory

6 "[S]o long as the "ultimate question for disposition' has remained the same in state and federal
 7 court, ... 'variations in the legal theory or factual allegations urged in its support' are entirely
 8 legitimate." *Robinson v. Schriro*, 595 F.3d 1086, 1102 n.14 (9th Cir.2010) (quoting *Picard v. Connor*,
 9 404 U.S. 270, 277 (1971)), *cert. denied sub nom Ryan v. Robinson*, 131 S.Ct. 566 (2010); *accord*
 10 *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir.2007); *McKinney v. Artuz*, 326 F.3d 87, 97 (2d
 11 Cir.2003); *Boyko v. Parke*, 259 F.3d 781, 788-89 (7th Cir.2001); *Weaver v. Thompson*, 197 F.3d 359,
 12 364-65 (9th Cir.1999).

13 Petitioner argues that many of his claims are exhausted. The Court agrees. Although many of
 14 the arguments brought in this federal petition are more specific and provide more detail about the basis
 15 for the claims, the Nevada Supreme Court was fully and fairly advised of the federal nature and most
 16 specifics of the following claims in the appellant's various appellate briefs. The additional detail has
 17 not changed the substantive legal nature of the claims. *Luna v. Cambra* 306 F.3d 954, 965 (9th Cir.
 18 2002) as amended by 311 F.3d 928 (9th Cir. 2002); *see Brown v. Myers*, 137 F.3d 1154, 1157 n. 3 (9th
 19 Cir. 1998); *see also Jones v. Hess*, 681 F.2d 688, 694 (10th Cir.1982). After an exhaustive review and
 20 comparison of the various appellate briefs and the instant claims, the Court finds, that the following
 21 grounds have been exhausted through fair presentation to the state's highest court:

22 Grounds: 1-1 subparts (A)(1)-(5), (D)-(E), (F)(1)-(2), (F)(4), (H)-(J), (M) and (O);
 23 1-2 subparts (A), (D), (E), (F), (L)(1)-(4), (M) and (S);
 24 2 subparts (A), (B)(6) and (B)(8);
 25 3 subparts (A), (C) and (D);
 26

4 subparts (A)-(C), (E) and (F);

10, 11 and 13.

The Court finds that all remaining grounds for relief are unexhausted including:

Grounds: 1-1 subparts (A)(6), (F)(3), (G), (K), (L), (N) and (P);

1-2 subparts (B), (C), (G)-(K), (L)(5), (N)-(R), (T)-(CC);

2 subparts (B)(1)-(5), B(7), (B)(9) and (B)(10);

3 subpart (B);

4 subparts (D), (G) and (H);

5 through 9 and 12 .

IV. Petitioner's Mixed Petition

A federal court may not entertain a habeas petition unless the petitioner has exhausted available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both exhausted and unexhausted claims is subject to dismissal. *Id.* Because the Court finds that the petition is a “mixed petition,” containing both exhausted and unexhausted claims, petitioner has options:

1. He may submit a sworn declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and proceed only on the exhausted claims;
2. He may return to state court to exhaust his unexhausted claims, in which case his federal habeas petition will be denied without prejudice; or
3. He may file a motion asking this Court to stay and abey his exhausted federal habeas claims while he returns to state court to exhaust his unexhausted claims.

See Rose v. Lundy, 455 U.S. 509, 510 (1982); *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

Petitioner’s failure to choose any of the three options listed above, or seek other appropriate relief from this Court, will result in his federal habeas petition being dismissed. Petitioner is advised to carefully consider the limitations periods for filing federal habeas petitions contained in 28 U.S.C.

1 § 2244(d), as those limitations periods may have a direct and substantial effect on whatever choice he
2 makes regarding his petition.

3 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 50) is
4 **GRANTED IN PART AND DENIED IN PART.** The Court finds that Grounds: 1-1 subparts (A)(6),
5 (F)(3), (G), (K), (L), (N) and (P); 1-2 subparts (B), (C), (G)-(K), (L)(5), (N)-(R) and (T)-(CC); 2
6 subparts (B)(1)-(5), B(7), (B)(9) and (B)(10); 3 subparts (B); 4 subparts (D), (G) and (H); and Grounds
7 5 through 9 and 12 are unexhausted, having not been fairly presented to the Nevada Supreme Court.

8 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** to either:
9 **(1)** inform this Court in a sworn declaration that he wishes to formally and forever abandon the
10 unexhausted grounds for relief in his federal habeas petition and proceed on the exhausted grounds; **OR**
11 **(2)** inform this Court in a sworn declaration that he wishes to dismiss this petition without prejudice
12 in order to return to state court to exhaust his unexhausted claims; **OR (3)** file a motion for a stay and
13 abeyance, asking this Court to hold his exhausted claims in abeyance while he returns to state court to
14 exhaust his unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or seek
15 other appropriate relief, respondents may respond to such motion as provided in Local Rule 7-2.

16 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted grounds,
17 respondents shall have **thirty (30) days** from the date petitioner serves his declaration of abandonment
18 in which to file an answer to petitioner's remaining grounds for relief. Petitioner shall thereafter have
19 **twenty (20) days** following service of respondents' answer in which to file a reply.

20 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within the time
21 permitted, this case may be dismissed.

22 Dated this 28 day of January, 2013.

23 

24

UNITED STATES DISTRICT JUDGE